

IN THE MATTER OF

*

BEFORE THE

MICHAEL HEISLER,

*

COMMISSIONER OF

*

FINANCIAL REGULATION

Applicant.

*

OAH NO.: DLR-CFR-76B-10-16597

* * * * *

PROPOSED ORDER

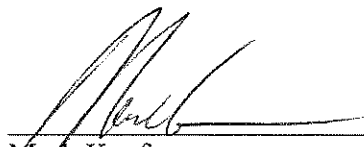
The Proposed Decision of the Administrative Law Judge in the captioned case having been considered in its entirety, it is **ORDERED** by the Commissioner of Financial Regulation (the "Commissioner") this 13th day of September, 2010 that the Proposed Decision shall be and hereby is adopted as a Proposed Order.

Pursuant to COMAR 09.01.03.09, Applicant has the right to file exceptions to the Proposed Order and present arguments to the Commissioner. Applicant has twenty (20) days from the postmark date of this Proposed Order to file exceptions with the Commissioner. COMAR 09.01.03.09A(1). The date of filing exceptions with the Commissioner is the date of personal delivery to the Commissioner or the postmark date on mailed exceptions. COMAR 09.01.03.09A(2).

Unless written exceptions are filed within the twenty (20)-day deadline noted above, this Order shall be deemed to be the final decision of the Commissioner.

COMMISSIONER OF FINANCIAL REGULATION

By:


Mark Kaufman
Deputy Commissioner of Financial Regulation

MICHAEL HEISLER,

*

BEFORE WILLIAM SOMERVILLE,

APPELLANT

*

AN ADMINISTRATIVE LAW JUDGE

v.

*

OF THE MARYLAND OFFICE OF

OFFICE OF THE COMMISSIONER OF

*

ADMINISTRATIVE HEARINGS

FINANCIAL REGULATION

*

OAH CASE No: DLR-CFR-76B-10-16597

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
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CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On March 30, 2010, the Office of the Commissioner of Financial Regulation, Department of Labor, Licensing and Regulation (Agency), denied a renewal application for a mortgage loan originator license which was submitted by Michael Heisler (Appellant). On or about April 19, 2010, the Appellant filed a request for hearing to challenge the determination. On April 28, 2010, the Agency referred the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on June 23, 2010, at the OAH in Hunt Valley, Maryland, pursuant to section 11-608(c) of the Financial Institutions Article, Annotated Code of Maryland (Supp. 2009). Jedd Bellman, Staff Attorney, Office of the Attorney General, represented the Agency. The Applicant was represented by R. Christopher Leone, Esq.

Procedure in this case is governed by the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); OAH's Rules of Procedure, Code of Maryland Regulations (COMAR) 28.02.01; and the Rules of Procedure of the Agency, COMAR 09.01.03.

ISSUE

Did the Agency properly deny the Applicant's renewal application for a mortgage loan originator license?

SUMMARY OF THE EVIDENCE

Exhibits

The Agency offered the following documents, which I admitted (except as otherwise noted) into evidence:

- CFR Ex. 1. Notice of Hearing
- CFR Ex. 2. Letter, 4-26-10
- CFR Ex. 3. Letter, 3-30-10
- CFR Ex. 3A. Receipts for Certified Mail
- CFR Ex. 3B. Letter from the Appellant, undated
- CFR Ex. 4. Licensing History sheet (not admitted)
- CFR Ex. 5. Application for license renewal and checklist, various dates
- CFR Ex. 6. Experian U.S. Credit Profile Report, 2-4-10

The Appellant offered the following exhibits, which I admitted into evidence as follows:

- Appellant Ex. 1 Letter, 6-22-10
- Appellant Ex. 2 Roster of Members, undated
- Appellant Ex. 3 Packet of seven letters, various dates

Testimony

The Appellant testified on his own behalf and offered testimony from Bruce B. Eisenstein.

The Agency offered testimony from Arlene Williams, Assistant Supervisor of Licensing for the Agency.

FINDINGS OF FACT

Upon review of the demeanor evidence, testimony, and other evidence, I find the following facts by a preponderance of the evidence:

1. In July 2009, the Appellant applied for renewal of a license to be a mortgage loan originator. Shortly thereafter, he was granted the license.
2. On January 28, 2010, the Appellant filed with the Agency another renewal application; on that date he applied on line through the Nationwide Mortgage Licensing System website.
3. On that date, when he answered disclosure question "C", which asked about whether he had any "unsatisfied judgments or liens," the Appellant answered "yes."
4. At that time, when the Appellant submitted the application on line, a box popped up on the computer monitor explaining that because he answered "yes" to a disclosure question, he was required to submit an explanation to the Agency within five days.
5. At that time, the Appellant was in the process of working out a payment plan with the Comptroller of the Treasury to pay off a Maryland tax lien.
6. At that time, the Appellant had already agreed to a payment plan to pay back income taxes to the Federal government.
7. At that time, the Appellant was contemplating filing a Chapter 7 bankruptcy case to

discharge some debts accumulated from 2000 through 2006.

8. The Appellant did not submit to the Agency an explanation of his answer to the disclosure question within five days, or at any time.
9. On February 4, 2010, an application reviewer at the Agency obtained an Experian Credit Report on the Appellant. That report accurately showed, as of that time, the following:
 - State tax lien for \$14,065
 - Federal tax lien for \$73,810
 - Judgment in the amount of \$1,105
 - Past due account for \$8,262
 - Past due account for \$1,471
 - Charge off account of \$2,963
 - Charge off account of \$5,744
 - Charge off account of \$845
 - Charge off account of \$1,087.
10. On February 6, 2010, an application reviewer at the Agency noted a “deficiency” in the Appellant’s application with regard to the disclosure question.
11. On March 30, 2010, still not having received any explanation or documentation from the Appellant regarding the liens and judgments, the Agency issued a notice of action denying the application based upon statutory financial responsibility requirements.
12. On or about April 19, 2010, the Appellant filed a request for hearing to challenge the Agency’s determination.
13. On April 30, 2010, the Appellant filed a Chapter 7 bankruptcy case, in an effort to resolve or discharge debts. (Appellant Ex.1.)

14. The Appellant is a habitual gambler. Much of his debt flows from gambling.
15. The Appellant attends Gamblers Anonymous meetings one time per week. He has done so for about three years. The Appellant recognizes that he has a gambling problem and he tries to compensate by not carrying a lot of cash with him.
16. The Appellant did not disclose his gambling problem until the time of the hearing in this matter.

DISCUSSION

The Appellant has the burdens of production and persuasion to demonstrate that he has “demonstrated financial responsibility, character, and general fitness sufficient to command the confidence of the community and to warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently.” Md. Code Ann., Fin. Inst. § 11-605(a)(3) (Supp. 2009); *see also* Md. Code Ann., State Gov’t Art., § 10-217 (2009); *Comm’r of Labor and Indus. v. Bethlehem Steel Corp.*, 344 Md. 17 (1996).

In the instant case, the Agency argues that it denied the Applicant’s renewal application because it determined that the Applicant had not demonstrated the required financial responsibility. The Agency points to the fact that the Applicant is heavily in debt, with many past due accounts, judgments, and liens. The Agency also argues that the Appellant provided no documentation explaining his financial situation. The Agency argues that the circumstances of this case do not allow the Agency to determine that the Appellant is “financially responsible” as that concept is used in the statutory scheme.

The Appellant argues that he did not know that he had to affirmatively offer information to explain his financial condition or status. He argues that he did not have an opportunity to show his financial responsibility and that, despite his gambling addiction and financial condition,

he was nevertheless financially responsible. He argues that he is in the process of rectifying his financial condition.

The statute that requires an applicant to demonstrate financial responsibility requires the applicant to show “financial responsibility, character, and general fitness sufficient to command the confidence of the community and to warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently.” Md. Code Ann., Fin. Inst. § 11-605(a)(3) (Supp. 2009). As of the time that the Appellant submitted his online application, he did not show the responsibility, character, and fitness required; he showed, on the other hand, a lack of financial responsibility. The statement in the renewal application that he had judgments and liens (Finding of Fact 3) raised a presumption that the Appellant was financially irresponsible, to some extent; certainly, that information did not demonstrate financial responsibility.¹ On the basis of that information, the Agency could properly have decided that the Appellant had not shown financial responsibility. Md. Code Ann., Fin. Inst. § 11-605(a)(3).

The Agency investigated and found in the Appellant’s credit report the underlying factual foundation for the Appellant’s answer to the disclosure question. The details of the credit report were “red flags” of financial irresponsibility. (Finding of Fact 9.) The Appellant offered nothing in his application to show that he was financially responsible. Based upon the information that the Agency had at the time of the denial, the Agency was compelled to deny the application for those reasons set forth in the notice of action. (CFR Ex. 3.) Md. Code Ann., Fin. Inst. § 11-605(a)(3).

The Appellant argues that he did not know that he had to affirmatively offer information to explain his financial condition or status. He argues that he did not have an opportunity to

¹ See Md. Code Ann., §8-311(a)(9) (financial solvency) and COMAR 09.08.01.19 (credit reports) for analogous analysis done when a person applies for a Maryland Home Improvement Commission license.

show his financial responsibility. I am not persuaded by that argument. Evidence was clear that the Appellant was alerted that he had to take affirmative steps to explain his answer to disclosure question “C” in order to complete the application and in order to satisfy the Agency that the liens and judgments posed no obstacle to the application process. (Findings of Fact 3 and 4.)

The Appellant also argues that, despite his gambling addiction and financial condition, he is now, nevertheless, financially responsible. He argues that he is in the process of rectifying his financial condition.

The evidence of financial responsibility that the Appellant must show is that which tends to be “sufficient to command the confidence of the community and to warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently.” Md. Code Ann., Fin. Inst. § 11-605(a)(3). There is no definition of the term “financially responsible” nor is there in the statutory scheme a list of factors to consider in making such a determination. No such definition exists in the Agency regulations. *See* COMAR 09.03.09.01 through .07. It is clear, however, that what the Appellant in this case must show is evidence that will instill confidence and will cause a trier of fact to determine that he will operate his business fairly, honestly, and efficiently.

When a person has a gambling addiction, there is a loss of confidence. *See*, L.R. Masterson, *Rolling the Dice: The Risks Awaiting Compulsive Gamblers in Bankruptcy Court*, Norton Bankr. Law Adviser, No. 4: 3 (2010). Although the several character reference letters that the Appellant offered into evidence were glowing, they were not very specific. The Appellant’s financial record, in conjunction with his gambling problem, does not cause me to confidently determine that he will operate his business fairly and efficiently. From time to time, there could be a conflict of interest between the Appellant’s compulsion to obtain money for his

addiction, and the Appellant's duty of care in dealing with his customers. *See* COMAR

09.03.09.04 (Duty of Care). The credible evidence before me shows that the Appellant is in the process of getting his finances "back on track." He is in the midst of the financial responsibility rehabilitation process. (Findings of Fact 5, 6, 13, and 15). Starting, or participating in, a self-help group, alone, is not a persuasive demonstration of rehabilitation. As a trier of fact, I would want to see a good and substantial track record of those things that manifest financial responsibility² before I would determine that the Appellant meets the responsibility requirements.

The Appellant has the burdens in this case. I am not persuaded by a preponderance of the evidence³ that the Appellant, at this time, has shown "financial responsibility, character, and general fitness sufficient to command the confidence of the community and to warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently." Md. Code Ann., Fin. Inst. § 11-605(a)(3) (Supp. 2009).

CONCLUSIONS OF LAW

I conclude as a matter of law that the Appellant has not shown that the Agency improperly denied the Appellants' application for a mortgage loan originator's license. Md. Code Ann., Fin. Inst. § 11-605(a)(3) (Supp. 2009).

² By analogy, the Motor Vehicle Administration requires evidence of six months of sobriety, among other things, before it will even consider whether the person is rehabilitated with regard to substance abuse or addiction. COMAR 11.17.03.04I(3). Also, by rough analogy, the Court of Appeals looks at evidence of reformation, present character, and present qualifications before deeming a person to be rehabilitated for re-admission to the Bar. *In Re Braverman*, 271 Md. 196 (1974) (eighteen-year period of rehabilitation).

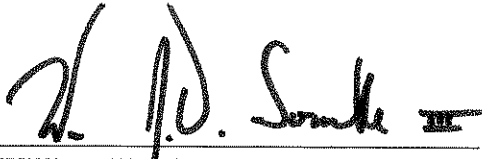
³ Even if the evidence is in equipoise, the Appellant does not prevail.

RECOMMENDED ORDER

I recommend that the Maryland Commissioner of Financial Regulation

ORDER that the Appellant's application for a mortgage loan originator's license be denied, at this time.

August 23, 2010
Date Decision Mailed



William J.D. Somerville III
Administrative Law Judge

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